PD-1034-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/15/2021 4:04 PM
Accepted 6/16/2021 8:13 AM
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In the Court of Criminal Appeals of Texas

Terry Martin,
Appellant,
v.
The State of Texas,
Appellee.

Brief of Amici Curiae Texas Criminal Defense Lawyer's Association and Lubbock Criminal Defenses Lawyers Association In Support of Appellant

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TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES

Constitutional Provisions, Statutes, and Rules

INDEX OF AUTHORITIES

Secondary Sources

INTEREST OF AMICI CURIAE

The Texas Criminal Defense Lawyers Association (TCDLA) is a non-profit, voluntary, membership organization. It is dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense lawyers. It provides a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases. TCDLA also assists the courts by acting as *amicus curiae* in appropriate cases. The Lubbock Criminal Defense Lawyers Association (LCDLA) is a nonprofit professional organization of licensed attorneys practicing criminal defense in Lubbock and its surrounding communities. The purpose and mission of LCDLA is to connect and educate each of its members by providing member support and continuing legal education on a variety of subjects related to criminal law. The core mission of LCDLA is to protect the promises of the United States Constitution and the Texas Constitution. Neither TCDLA nor any attorney representing TCDLA nor LCDLA or any attorney representing LCDLA has received any fee or other compensation for preparing this brief. This brief complies with all applicable provisions of the Rules of Appellate Procedure. Copies have been served on all parties to the cause.

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the Texas Criminal Defense Lawyers Association and Lubbock Criminal Defense Lawyers Association and respectfully submit this Amici Curiae Brief in Support of Appellant.

Relevant Facts

Corporal Michael Macias, assigned by the Lubbock County Sheriff to the Texas Anti-Gang Center Task Force, saw a motorcycle pass by him which "appearedto be traveling higher than the posted speed limit." (3RR11-14). Macias testified:

> While pacing the vehicle, I also observed it to have an obscured license plate. There was a piece hanging from the seat area covering one of the digits, which made the license plate unreadable. I also noticed during this time that the vehicle made an unsafe lane change. It passed a vehicleand cut in back to the right-hand lane, not giving it sufficient braking room in case an emergency occurred.

(3RR15). Macias seized Appellant. (3RR15). Macias testified:

> As I was behind him, I noticed he was wearing a three-piece cut of whatis known to me from training and experience is a member of the Cossack Outlaw Motorcycle Gang. For officer safety and based off of training, I had him place his hands on his head to make sure he had a harder timeto access any potential weapons he may have had.

(3RR16). After Macias determined Appellant had a handgun, he arrested him.(3RR21-23; 30). His dashcam reveals Macias declaring, "I got me a memberof the Cossack motorcycle gang." (State's Exhibits 1 & 5).

Lubbock County deputy sheriff Joshua Cisneros testified extensively about gangs, the gang database, and the infamous incident in Waco where various motorcycle club members had met and a shooting had taken place. (9RR49-149). Cisneros was a member of the International Outlaw Motorcycle Gang Investigators Association and studied gangs on a national level. (3RR55). Cisneros testified:

> The Penal Code states that the definition of a criminal street gang is three or more individuals. That doesn't necessarily mean that in the commission of an offense that you have to have three or more committing it for it to be a criminal street gang. It's only the definitionof a criminal street gang that there's three or more.

(3RR103).

Appellant testified that part of his tool bag had slipped, partially obscuring his license plate. (4RR30-31). He denied speeding and testified that his lane change was not unsafe. (4RR31-32; State's Exhibit 5). Appellant testified he was a mechanic at Camping World in Lubbock and had never been convictedof any offense other traffic violations. (4RR23-24, 28). In order to be a Cossack, a member must be a male at least 21 years old and "cannot be a drug trafficker, junkie, user of needles." (4RR32). A member who violated this rulewas expelled from the club. (4RR32). While peace officers are not allowed tojoin the Cossacks, the club does include correctional officers. (5RR25).

Among the six Cossacks in Lubbock, Appellant knew none of them to be convicted felons. (4RR28). He did not know of any Cossack having been tried or convicted for any offense, and did not consider the motorcycle club to be a criminal street gang. (4RR23, 27).

Summary of the Argument

Section 46.02(a-1)(2)(C) of the Texas Penal Code does not require proof that the defendant himself was continuously or regularly committing crimes in order to be criminally liable for unlawful carrying of a weapon as a member of a criminal street gang. The State Prosecuting Attorney's construction of the statute is faithful to the rules of statutory construction. However, this construction also exposes the unconstitutionality of this statute. Section 46.02(a-1)(2)(C), unlike Section 71.01 from which it derives, violates First Amendment rights to association and speech, deprives handgun owners of the Fourteenth Amendment's guarantee of substantive due process, impairs the freedom to travel, and defeats the purpose of carrying a handgun under the Second Amendment. Moreover, the statute permits conviction based on guilt by association, a rationale long condemned in constitutional law. Without this provision, there is no evidence that Appellant unlawfully carried his handgun and was entitled to an acquittal.

ARGUMENT

This Court granted the petition for discretionary review of the State Prosecuting Attorney (hereinafter "SPA") on the following question of statutory construction:

> Does unlawful carrying a weapon by a gang member, TEX. PENAL CODE §46.02(a-1)(2)(C), require proof the defendant was continuously or regularly committing gang crimes?

The short answer to this question is "no." The statute's failure to require proof of the defendant's own personal criminality is why it is unconstitutional.

I. APPLICABLE STATUTORY PROVISIONS

I.A. Unlawful Carrying of a Weapon and "Criminal Street Gang"

Section 46.02 of the Texas Penal Code provides in pertinent part:

> (a-1) A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which:
>
> > (1) the handgun is in plain view, unless the person is licensed to carry a handgun under Subchapter H, Chapter 411, Government Code, and the handgun is carried in a shoulder or belt holster; or
> >
> > (2) the person is:
> >
> > > (A) engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating;

> (B) prohibited by law from possessing afirearm; or
>
> (C) a member of a criminal street gang, asdefined by Section 71.01.

TEX. PEN. CODE ANN. § 46.02(a-1). Another provision of the Penal Code defines "criminal street gang" as

> [T]hree or more persons having a common identifying sign or symbol oran identifiable leadership who continuously or regularly associate in thecommission of criminal activities.

TEX. PEN. CODE ANN. § 71.01(d).

I.B. The Juncture Between Engaging in Organized Criminal Activity and Unlawful Carrying of a Weapon

The history of the relationship between the Engaging in Organized Criminal Activity statute in Chapter 71 and the Unlawful Carrying of a Weapon ("UCW") in Section 46.02 informs this Court of the appropriate construction at issue in this case. Specifically, both statutes share identical language, i.e., the definition of "criminal street gang." While the language is the same, it operates very differently in Chapter 71 than it does in Section 46.02. In short, this shared language is perfectly constitutional in one domain and perfectly unconstitutional in another.

In 1977, the Texas Legislature created its "Organized Crime" statute withoutreference to criminal street gangs. Act of May 27, 1977, 65th Leg. R.S., ch. 346, 1977 Tex. Gen. Laws 922, codified at TEX. PENAL CODE ANN. ch. 71.1. In 1991, the

Legislatureadded "criminal street gang" and its definition to chapter 71.[1] Act of September 1, 1991, 72nd Leg. R.S., ch 555, 1991 Tex. Gen. Laws 1968. The additionof this language to Chapter 71 was not controversial and was consistent with its other provisions.

In 2007, the Legislature copied its "criminal street gang" language from Chapter 71 and pasted it into Section 46.02. Act of September 1, 2007, 80th Leg., R.S., ch. 693, 2007 Tex. Gen. Laws 1318. Lawmakers likely assumed that lifting an uncontroversial and constitutional Penal Code provision from one statute and implanting it into another Penal Code provision would pose no problems. Unfortunately, the transplant was not a success.

Under Section 71.01(d), "criminal street gang" is broadly defined to include any criminal group of three or more persons. The definition of "criminal street gang" was never controversial so long as it remained in chapter 71 because the language in Section 71.02 limited its application to specific offenses.[2] TEX. PEN. CODE ANN. § 71.02.

---

[1] The original organized criminal activity statute required five or more persons. The Seventy-First Legislature reduced that number to three. Act of May 27, 1989, 71st R.S., ch. 782, Tex. Gen. Laws 3468.

[2] Section 71.02 provides: "A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit" one or more of eighteen categories of offenses, from capital murder to misdemeanor assault or gambling. TEX. PEN. CODE ANN. §71.02(a)

Section 71.02 attaches criminal liability to any member of a "criminal street gang" *only* when that named member (the accused) commits a specific enumerated offense. *Id*. It is this limitation that supports the constitutionality of "criminal street gang" as it operates in an interlocking fashion with the other provisions in Section 71.02.

Rooting "criminal street gang" to Section 71.02's enumerated predicate offenses is why "criminal street gang" is constitutional for prosecutions for organized criminal activity. A person does not commit any offense simply because he has joined a gang; the defendant must have first committed some specific offense, i.e., a predicate offense. As this Court has observed, Chapter 71 "would not permit conviction on a bare finding of the defendant's status as a gang member[,]" but only on proof that he "committed the predicate offense 'as a member of a criminal street gang'" as well as "proof of a connection or nexus between the defendant's commission of the underlying offense and his gang membership." *Zuniga v. State*, 551 S.W.3d 729, 734 (Tex. Crim. App. 2018).

In 2007, the 80th Legislature lifted "criminal street gang" from its Chapter 71 home created by the 65th Legislature, where it was constitutional, and unfortunately grafted it upon the "Unlawful Carrying Weapons" statute in Section 46.02. "Criminal street gang" was bound in its home chapter by predicate offenses.

But Section 46.02 has no predicate offense, leaving a person's status as a gang member the linchpin for criminal liability.

Those specified predicate offenses attached criminal liability only on proof that the defendant himself committed one of them. Section 71.02 interlocked with 71.01's definition to create a self-contained statutory scheme aimed at reaching organized criminal conduct, just as lawmakers intended. These interlocking provisions are why the Engaging in Organized Criminal Activity chapter is constitutional: guilt under Chapter 71 is not predicated on association or membership, but upon acts personal to the defendant himself.

In sharp contrast, personal acts are irrelevant under Section 46.02. Under Section 46.02, "criminal street gang" is a stand-alone provision that requires nothing other than proof that the defendant was a member of the group. On this specific point, Amici and the SPA agree.

Under this reading, a person's perfectly lawful act of carrying his weapon is transmuted into criminality for only one statutory mechanism—the appearance of the Chapter 71's "criminal street gang" language. Status is all that is necessary to be found guilty of an act otherwise entirely legal.

In Chapter 71, status is narrowed before criminality attaches. In Section 46.02, status determines criminality. It alone constitutes the difference between lawfully

carrying a handgun and *un*lawfully carrying a handgun. Unlike chapter 71, conviction for unlawful carrying of a weapon *is* permitted "on a bare finding of the defendant's status as a gang member." *Zuniga,* 551 S.W.3d at 734. Settled rules of statutory construction demonstrate this state of affairs.

II. STATUTORY CONSTRUCTION AND THE FLAWS OF EX PARTE FLORES

"'Criminal street gang' means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." TEX. PEN. CODE ANN. § 71.01(d). The SPA argues that the plain text of the "gang member" language requires "(1) the defendant must be a member of a gang and (2) the gang, among other things, must continuously or regularly associate in the commission of crime." (SPA brief, p. 11). Amici agrees.

Before a group can be a gang, it must have at least three people as members. Before that group can be deemed "criminal," its members must have shared symbology or be organized with leaders and followers. If its members "continuously or regularly associate in the commission of criminal activities," then this identifiable and organized group constitutes a "criminal street gang" under the statute. This is a plain reading the Court of Appeals refused to follow.

Instead, the Seventh Court of Appeals followed the Fourteenth Court of Appeals in *Ex parte Flores*, 483 S.W.3d 632 (Tex. App.—Houston 14th Dist. 2015, pet. ref'd). *Martin v. State*, No. 07-19-00082-CR, 2020 WL 5790424 at *4 (Tex. App.—Amarillo Sept. 28, 2020, pet. granted). Citing *Ex parte Flores*, the Seventh Court of Appeals held:

> To be a gang member for purposes of prosecution under the statute, "an individual must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership *and must also* continuously or regularly associate in the commission of criminal activities." While the evidence establishes the first half of the equation, i.e., appellant's membership as a Cossack, the record is devoid of evidence of the second half, i.e., a showing that he associated in the commission of criminal activities. Under *Ex parte Flores*, both gang membership and a connection to criminal conduct are required.

Id. at *4 (citing *Flores*, 483 S.W.3d at 648) (emphasis in original).

The *Flores* Court rewrote Section 71.01(d) in a strenuous effort to save it from its unconstitutional operation in Section 46.02. The court likely did so to fulfill its stated imperatives, i.e., to "apply the interpretation that sustains its validity" "[w]hen there are different ways the statute can be construed" and to "uphold the statute if we can determine a reasonable construction that will render it constitutional." *Ex parte Flores*, 483 S.W.3d at 643 (citations omitted).

But there is a well-established limit to these aspirations which *Flores* and *Martin* crossed: "Where the statute is clear and unambiguous, the Legislature must

be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (internal citations and quotations omitted); *see Colo. Cty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017) (quoting *In re Ford Motor Co.*, 442 S.W.3d 265, 284 (Tex. 2014)) ("When interpreting the Legislature's words . . . we must never 'rewrite the statute under the guise of interpreting it.'"); *Ex parte Levinson*, 160 Tex. Crim. 606, 609, 274 S.W.2d 76, 78 (1955) (Rejecting an interpretation where the Court "would necessarily rewrite the statute for the legislature"); *Simmons v. Arnim*, 110 Tex. 309, 324, 220 S.W. 66, 70 (1920) ("Courts must take statutes as they find them. More than that, they should be willing to take them as they find them.").

As this Court has explained:

> Although a Texas court has a duty to employ, if possible, a reasonable narrowing construction to avoid a constitutional violation, such a construction should be employed only if the statute is readily susceptible to one. We may not rewrite a statute that is not readily subject to a narrowing construction because such a rewriting constitutes a serious invasion of the legislative domain and would sharply diminish the legislature's incentive to draft a narrowly tailored statute in the first place.

State v. Johnson, 475 S.W.3d 860, 872 (Tex. Crim. App. 2015) (construing plain statutory language with an "unambiguously broad command" ultimately found to be unconstitutional) (internal quotations and citations omitted). In its effort at

narrowing the statute, the *Flores* Court crossed this line of statutory construction, thereby violating the Separation of Powers provision in Article II of the Texas Constitution.

Under *Flores*, the statute now reads:

> "Criminal street gang" means only those people who are members of a group with a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities, so long as the group has members at least three in number. All other members of the same group who are not among the three or more persons who continuously or regularly associate in the commission of criminal activities are excluded from this definition.

If the statute actually contained these words, Appellant might have produced a copy of it to a grateful Corporal Macias and proceeded on his way. But the statute does not contain these words. *Flores*'*s* strained interpretation violates basic rules of statutory construction by drafting a new statute. *See United States v. Reese*, 92 U.S. 214, 221 (1875) (courts cannot "introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only[,]" because to do so "would be to make a new law[.]"); *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (courts must "presume the Legislature included each word in the statute for a purpose, and that words not included were purposefully omitted") (internal quotations omitted).

Flores insisted that its "interpretation does not add language; it gives the statute its proper grammatical interpretation." *Flores*, 483 S.W.3d at 644. This defensive statement is demonstrably untrue. *Flores* added quite a lot of new language. *Flores* resorted to grammatical legerdemain by stating two undisputed propositions, then falsely claiming they supported its conclusion.

Flores observed: "Grammatically, the group of words 'having a common identifying sign or symbol or an identifiable leadership' is a participial phrase acting as an adjective that modifies the noun 'persons.'" *Id.* The fact that the phrase modifies the only grammatically available noun ("persons") does not compel the conclusion that "three or more persons" is a subgroup of another unnamed noun. "Three or more persons" *is* the group which defines "criminal street gang."

From this true but irrelevant distraction, *Flores* pivots to another: "The statute does not apply to three or more persons solely because they have a common identifying sign or symbol." *Id.* It is true that the statute does not apply unless the group involves itself in criminal activities. Again, this observation does nothing to support *Flores*'*s* conclusion that "criminal street gang" applies only to those members who commit crimes and not to all members of the group.

Flores never supports its conclusion that "criminal street gang" means something other than the entire self-identified or self-organized group. *Flores* ignores

the fact that this broad definition is constitutionally restricted under chapter 71, but unconstitutionally unrestricted under Section 46.02.[3] "Criminal street gang" is as broad as its language self-evidently reflects. It describes any identifiable group that is three or more in number.

This familiar statutory scheme—a broad definition narrowed by specific rules of criminal liability—works perfectly well in prosecutions under Chapter 71. It is consistent with the familiar overall architecture of the Texas Penal Code. But this workable scheme collapses when the same definition is used as a stand-alone in a foreign statute like Section 46.02.

Without its original statutory moorings, the definition's broad reach remains, but without any Section 71.02 restraint. Unlike Section 71.02, there is no language in Section 46.02 which narrows this expansive language to specified offenses by identified defendants. No judge can remedy this language without becoming a 2007 lawmaker giving a happier ending to the 2007 legislative mishap of dumping the entirety of Section 71.01(d) into Section 46.02. No judge attentive to settled rules of statutory construction will even try.

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[3] Under Section 71.02, a person commits an offense when, as a member of a criminal street gang, he acts with criminal intent to commit the various offenses specified by the Legislature. TEX. PEN. CODE ANN. §71.02(a). *Flores* is correct that the people who are criminally liable under Section 71.02 are only those three or more specific individuals (and no one else) named in any indictment identifying them for engaging in criminal activity. But this limitation is true only in the chapter 71 context. 71.01(d) into Section 46.02.

III. A CONSTITUTIONAL ANALYSIS OF SECTION 46.02 IS NECESSARY BECAUSE A PLAIN READING OF THE STATUTE WOULD RESULT IN A MULTITUDE OF GROUPS BEING CLASSIFIED AS A "GANG"

With the appropriate construction of "criminal street gang" agreed upon by both the SPA and Amici, its appearance in Section 46.02 creates problems of constitutional magnitude. The statute does not require that the person act or even be aware of criminal activities or those involved. Membership alone is enough to attach criminality, an unavoidable and unconstitutional result the SPA would have this Court ignore.

The SPA, having won a petition before this Court on a question of statutory construction, now seeks in its brief to confine this Court's analysis to a familiar question of sufficiency. "This Court need not delve into a full-blown constitutional analysis of the statute," the SPA argues, "merely because it has to construe the statute as part of its sufficiency review." (SPA brief, p. 17). Having baited this Court with its petition for discretionary review with a question of statutory construction, it switches in its brief to a strict question of sufficiency of the evidence. Amici insists that this Court cannot avert its eyes from the unconstitutional consequences of a plain reading of the "criminal street gang" provision. Before detailing why this statute in Section 46.02 is unconstitutional, a review of how it operates is a good illustration of the many ways it violates various constitutional rights. This Court

should consider the statute's application to other groups, say, the Republican Party or the Catholic Church. Each easily meets the explicit requirements to be deemed a "criminal street gang" under the statute.

For example, the Republican Party has three or members with shared symbology and a discernable leadership. As an association, three or more of its members regularly and continuously have associated in the commission of criminal activities. Under 71.01(d), the Grand Old Party is therefore a gang. The historical evidence is clear. Republican Jeb Stuart Magruder pled guilty to criminal conspiracy as chair of the Committee to Re-elect the Republican President, Richard Nixon. Nixon's chief of staff (Republican H.R. Haldeman) and Nixon's presidential counsel (Republican John Ehrlichman) were both convicted of conspiracy, obstruction of justice, and perjury. Nixon's personal attorney (Republican Herbert W. Kalmbach) was convicted of illegal campaigning. Nixon's special counsel (Republican Charles W. Colson) was convicted for obstruction of justice. Republican Herbert L. Porter, aide to the Committee to Re-elect the President, was convicted of perjury. Republican G. Gordon Liddy of the Republican Special Investigations Group was convicted of burglary. Nixon's attorney general, Republican John N. Mitchell, was convicted of perjury and served nineteen months in prison. Nixon's vice-president Spiro Agnew was convicted of tax fraud.

Would this evidence be enough to ensnare every member of the Grand Old Party, including those who have never personally committed an offense or associated in criminality? The SPA's answer is a resounding affirmation: "A plain-language interpretation of the statutes requires neither a defendant's own personal criminal conduct nor his continuous or regular association in the commission of crime." (SPA brief, p. 17). Like Appellant, a Republican need have done nothing more than put on a MAGA hat or wear a GOP elephant pin, thereby making him guilty of anything and everything the Party might do.[4]

The Catholic Church also fits the statutory definition of "gang." Priests regularly molested children over many years, resulting in over 3,000 civil lawsuits. Mayo Moran, *Cardinal Sins: How the Catholic Church Sexual Abuse Crisis Changed Private Law*, 21 GEO. J. GENDER & L. 95, 102-103 (Fall 2019). The U.S. Conference of Catholic Bishops estimated that nearly 4,400 Catholic clergy between 1950 and 2002 had been plausibly accused of the sexual abuse of a youth. *Id*. Members of the Catholic clergy sexually abused nearly 17,000 children between 1950 and 2012, though insurance experts estimate the number at 100,000. Elizabeth B. Ludwin King, *Transitional Justice and the Legacy of Child Sexual Abuse in the Catholic Church*,

[4] Of course, this is just one example. Members of the Republican Party's leadership have been found guilty of criminal offenses under President Ronald Reagan, George H.W. Bush, George W. Bush, and Donald Trump. This "gang," as the SPA would define it, has "regularly and continuously associated in criminal activities" for more than half a century.

81 ALB. L. REV. 121, 128 (2018). In the same way as joining the Grand Old Party makes a Republican criminally liable for the crimes of other Republicans, every Catholic likewise is a member of the criminal street gang called the Catholic Church under the statute.[5]

Of course, Catholics and Republicans are not routinely suspected of criminality because of their mere affiliation with the Grand Old Party or the Catholic Church. A motorcyclist with a concealed handgun riding the West Texas roads with a giant flag emblazoned with "Proud Republican Catholic Motorcyclist" need not fear arrest when stopped for a traffic offense. Only members of groups disfavored by law enforcement risk arrest for expressing their membership or association. It is this very state of affairs that demonstrates why this provision in Section 46.02 violates fundamental constitutional rights, as detailed next.

IV. SECTION 46.02 IS RIDDLED WITH CONSTITUTIONAL INFIRMITIES

IV.A. Section 46.02 is unconstitutional under the First and Fourteenth Amendments because it impairs the Right to Association, both on its face and as applied

Appellant has a constitutional right to association under both the First Amendment and the Fourteenth Amendment's Due Process Clause, despite its absence as one of the Clauses of those Amendments. *Healy v James*, 408 U.S. 169,

[5] Other groups could easily find themselves similarly categorized. The Jaycees, Rotarians, and Girl Scouts are halfway there, as each group has three or more members with a leadership and shared symbology. Designation as a criminal street gang is only a scandal or two away.

186 (1972) (holding the right to association is implicit in freedoms of speech, assembly, and petition); *La. ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961) ("[F]reedom of association is included in the bundle of First Amendment rights made applicable to the States"); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (holding association "is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

The language as it stands in Section 46.02 acts as an unconstitutional codification of guilt by association. By its plain terms, anyone associated with an identifiable or organized group which has at least three scofflaws can be a criminal in the eyes of law enforcement, an easy requirement to meet. It does not matter that the person has committed no offense. It does not matter if he is perfectly law-abiding. The statute's damning language inexorably envelops him, whatever might be his personal culpability.

"[G]uilt is personal." *Scales v United States*, 367 U.S. 203, 221-22 (1961). "[G]uilt by association remains a thoroughly discredited doctrine[.]" *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959). Consequently, "guilt by association" "is an impermissible basis upon which to deny" Appellant his rights to freely associate and remain free from this doctrine. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886,

932 (1982)("[G]uilt by association is a philosophy alien to the traditions of a free society and the First Amendment itself."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178-79 (1951) (Douglas, J., concurring) (guilt by association is "one of the most odious institutions of history[;]" "When we make guilt vicarious we borrow from systems alien to ours and ape our enemies."); *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring) (noting the prohibition against guilt by association is "one of the most fundamental principles of our jurisprudence" and "the very essence of the concept of freedom and due process of law[.]").

Section 71.01(d)'s language, as transported into Section 46.02, cannot be reconciled with this bedrock constitutional law. Appellant was lawfully carrying his weapon. He was prosecuted solely because of his membership in a group spurned by law enforcement. By authorizing arrest and prosecution on the bare status of a handgun owner's membership in a group, the statute deprives handgun owners their right to free association and due process of law. *Baird v. State Bar of Ariz.*, 401 U.S. 1, 9 (1971) (Stewart, J., concurring in judgment) ("[M]ere membership in an organization can never, by itself, be sufficient ground for a State's imposition of civil disabilities or criminal punishment"). Appellant is guilty of unlawfully carrying a handgun only because of his association with a group frowned upon by police.

Section 46.02 (a-1)(2)(C) transformed Appellant's otherwise lawful carrying of a handgun into a criminal act based solely on his status as a Cossack. Because his criminality is based solely on the exercise of his right of association, this Court should declare the statutory provision unconstitutional as contained in Section 46.02 as an infringement on his constitutional right to free association. Accordingly, the statute violates the First and Fourteenth Amendments to the Constitution of the United States.

IV.B. Section 46.02 is unconstitutionally vague under the Fourteenth Amendment's Due Process Clause, both on its face and as applied

The Due Process Clause of the Fourteenth Amendment condemns statutes which invite "arbitrary and discriminatory enforcement" of the law. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Under the statute, law enforcement can and does pick and choose its "street gang" members at will. In this way, it contravenes the vagueness doctrine under the Due Process Clause.

Making it a crime for any person in Texas to be a member of a "criminal street gang" is not materially different from New Jersey's statute that identified and criminalized anyone to be a "gangster."[6] *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

[6] It read: "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster[,]" punishable by a $10,000 fine and 20 years imprisonment or both. *Lanzetta v. New Jersey*, 306 U.S. at 452.

The U.S. Supreme Court found the provision unconstitutional because it "condemns no act or omission" and its terms "are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment." *Id.* at 458. Like "gangster," "criminal street gang" condemns no act or omission, only status. Handgun owners otherwise lawfully carrying their handguns in their vehicles are subject to arrest and prosecution if deemed to be a member of any "criminal street gang,", i.e., a "gangster." There is no meaningful difference between the statute in *Lanzetta* and the statutory provision in this case.

This statute is not construed against members of other groups, i.e., Rotarians, Jaycees, Kiwanis, Catholics or Republicans, who may and do travel freely, exercising all other constitutional rights without of fear of law enforcement action. Yet a sole "Cossack" may not. State action could not be more arbitrary or its administration more cherry-picked.

This statutory provision cannot co-exist with the Due Process Clause. *Smith v. Goguen*, 415 U.S. 566, 576 (1973) (holding a statute which permits "selective law enforcement" constituted "a denial of due process."); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (holding a law which "delegates basic policy matters to policemen" violates due process); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972) (holding a statute which places "unfettered discretion" in police hands

offends due process). Accordingly, this Court should declare it unconstitutional under the vagueness doctrine of the Due Process Clause.

IV.C. Section 46.02 is unconstitutionally overbroad under the First and Fourteenth Amendments, both on its face and as applied

A statute violates the First Amendment if, in reaching constitutionally proscribable activities, it also reaches "a substantial amount" of First Amendment protection. *Village of Hoffman Estates v. Flipside*, *Hoffman Estates*, 455 U.S. 489, 494 (1981); *Bynum v. State*, 767 S.W.2d 769, 772 (Tex. Crim. App. 1989). Overbreadth analysis applies not only to free speech, but freedom of association as well. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-613 (1973); *Elfbrandt v. Russell*, 384 U.S. 11 (1966). When a statute reaches these First Amendment freedoms, a "chilling effect" on those freedoms is enough to void the statute. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

Appellant has already demonstrated the chilly reception a handgun owner receives from law enforcement merely by being a member of a disfavored group. To avoid prolixity of argument, Appellant will not repeat, but will incorporate by reference, those freedom of association and guilt by association arguments. Here, Appellant will instead discuss how the statute reaches constitutionally protected free expression of every vehicular traveler who is also a member of any group singled out by police.

The First Amendment protects speech from laws that are deemed to be "content-based." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."). A law is "content-based "[i]f it is necessary to look at the content of the speech in question to decide if the speaker violated the law." *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014). "[W]earing clothes that particularly identify membership" in a group is content-based speech. *Martinez v. State*, 323 S.W.3d 493, 497, 505 (Tex. Crim. App. 2010). Appellant exercises his right to free speech by wearing his cut while operating his motorcycle in much the same way a person may express himself with a bumper sticker or other logo. Appellant's cut therefore constitutes content-based expression protected by the First Amendment.

Like the other First Amendment rights, statutes that effect speech in this way are subject to strict scrutiny. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (statute regulating speech "must be narrowly tailored to promote a compelling Government interest" and "the legislature must use that alternative."); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (courts apply "most exacting scrutiny to regulations that suppress, disadvantage, or impose different burdens upon speech because of its content."). Content-based restrictions "have the

constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality[.]" *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

As a traveling handgun owner, Appellant's right to identify and express himself as a member of a particular group is plainly inhibited by a statutory scheme that subjects him to seizure and prosecution the moment he affirms his association. A handgun owner riding his motorcycle may be treated as a free person only if he effectively silences himself. Had Appellant self-censored his association while exercising his right travel, he might not have been detained at all and at any rate, would have been as free as any Republican or Catholic.

As the Supreme Court has emphasized, overbreadth creates "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 432-433 (1963). This case underscores the truth of *Button's* observation. It is effectively illegal for a traveling handgun owner to express

his affiliation with a group the State finds objectionable. Because the statutory scheme reaches not only the right to association but the core right to free expression as well, the statute is overly broad and should be declared unconstitutional under the First and Fourteenth Amendments.

IV.D. Section 46.02 violates the right to substantive due process under the Fourteenth Amendment's Due Process Clause

In *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Supreme Court found a similar statute to be repugnant to the Due Process Clause in its operation against Mr. De Jonge, who was a member of the Communist Party and assisted in overseeing a Party meeting. Although he committed no offense, the State of Oregon prosecuted him under the Criminal Syndicalism Law, which declared it a felony to "preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage[.]" *De Jonge v. Oregon*, 288 U.S. at 356 n. 1. Mr. De Jonge was sentenced to seven years in prison. *Id.* at 358.

The sole evidence against De Jonge was proof that the Communist Party was a group which advocated criminal syndicalism and that Mr. De Jonge was member of that group. *Id.* at 359-60. The Court acknowledged that while legislatures can

enact laws to address the abuse of First Amendment rights,[7] "the legislative intervention can find constitutional justification *only by dealing with the abuse*. The rights themselves must not be curtailed." *Id.* at 365 (emphasis added). Thus, the Court concluded, the exercise of a First Amendment right "cannot be made a crime" and people like Mr. De Jonge "cannot be branded as criminals on that score." *Id.*

"Criminal street gang" in Section 46.02 deals with no abuse.[8] A person need do nothing more than be a member of an unpopular group. Appellant is deprived of substantive due process in precisely the same manner as Mr. De Jonge.

IV.E. Section 46.02 is violates the right to bear arms under the Second Amendment and the fundamental right to travel under the Fourteenth Amendment's Due Process Clause, both on its face and as applied

A review of state and federal law might lead a reasonable person to conclude that the rights of handgun owners to carry their weapons in their vehicles are well protected. Under the Fourteenth Amendment, traveling "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law[.]"[9] *Aptheker v.*

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[7] In this case, it was the Free Speech, Assembly, and Petition Clauses in the First Amendment that the statute violated.

[8] The Supreme Court further clarified: "If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation as the basis for a criminal charge." *De Jonge*, 288 U.S. at 365.

9 The right to travel is also "a constitutional liberty closely related to rights of free speech and association." *Aptheker v. Sec'y of State*, 378 U.S. at 517.

Sec'y of State, 378 U.S. 500, 505-506 (1964) (quoting *Kent v. Dulles*, 357 U.S. 116, 127 (1958)). Under the Second Amendment, a person has the right to possess a handgun for self-protection, a "*central component* of the right itself." *District of Columbia v. Heller*, 554 U.S. 570, 592, 599 (2008)(emphasis in original). In light of these constitutional rights, a handgun owner might celebrate them by traveling with his handgun.

If these constitutional guarantees were not reassuring enough for handgun owners, the Texas Legislature codified the Castle Doctrine. That codification equates a person's vehicle with his home, two of three "castles" where he is entitled by law to not merely carry his licensed handgun, but to use it toward its lawful intended use, in self-protection. TEX. PEN. CODE ANN. § 9.32(b)(1)(A), (B). A handgun owner might therefore conclude that his mere association with a group police find irksome would hardly be enough to defeat all other written law addressing the right to carry a handgun in one's vehicle. Like Appellant, he would be wrong in light of the statute at issue in this case.

The Texas statute is not meaningfully distinguishable from the *Aptheker* statute. The statute in *Aptheker* explicitly criminalized any travel by "any member of a Communist organization," regardless whether the traveler had any personal criminal intent. *Aptheker*, 378 U.S. at 510-511. The statute here criminalizes any

travel by any handgun owner who is a member of any ill-considered group, regardless of anything personal to the traveler himself. The Supreme Court declared the *Aptheker* Act an unconstitutional infringement on the right to travel because it operated under the invalid assumption that "all members shared" the "evil purposes" of "some members of the Communist Party[.]" *Id.* at 510-511. The statutory provision at issue in this appeal does no less. It operates against any traveling handgun owner under a generalized presumption of guilt and the more specific assumption that the traveler shares the *mens rea* of some members of his disfavored group.

The statutory scheme at issue in this appeal applies to any group and to all its members under the same presumption found to be unconstitutional under *Aptheker*. In this sense, it is a definition far broader than the statute in *Aptheker*, leaving it to law enforcement to identify any group, not merely communists. It is therefore more emphatically unconstitutional under *Aptheker*.

If the weight of *Aptheker* alone was not enough to invalidate this statutory scheme, *Heller* equates the constitutional right to carry with the constitutional "right of defense of one's person or house[.]" *Heller*, 554 U.S. at 586 (internal quotations and citations omitted). Texas passed a law that effectuated the handgun owner's constitutional right to carry a handgun for defensive purposes, clarifying that the

right extends to one's own vehicle. Appellant has a Second Amendment right to carry his arms in his vehicle for defensive purposes. U.S. CONST. amend. II.

The statute does not make it a crime for handgun owners to carry their guns at home or at the office. It is only when the owner seeks to exercise his right to travel does it become a problem. For no good reason, handgun owners must choose between their right to travel and their right to carry, despite the constitutional guarantee of both rights, including the right to exercise them simultaneously. *Shapiro v. Thompson*, 394 U.S. 618, 649 (1969), *overruled on other grounds, Edelman v. Jordan*, 415 U.S. 651 (1974) (recognizing under *Aptheker*, it is impermissible to impose a Hobson's choice and force a potential traveler to choose between his right to travel and his other constitutional rights). Under the Second Amendment's right to carry and the Fourteenth Amendment's right to travel, separately or in tandem, this Court should condemn the law that denies handgun owners their right to travel and to carry their handguns at the same time, as they are entitled to do under constitutional and statutory law.

CONCLUSION

Section 46.02(a-1)(2)(C) means what it says, and what it says is unconstitutional for the reasons articulated above. The inventiveness of *Ex parte Flores* cannot rescue it. Without this section, Appellant is not guilty of unlawfully

carrying of a weapon. Acquittal was the appropriate remedy in this case. *Flores v. State*, 245 S.W.3d 432, 443-44 (Tex. Crim. App. 2008)(Cochran, J., concurring). This Court should affirm the decision of the court of appeals, reject *Ex parte Flores's* construction, recognize the consequences of a proper construction and dismiss the Information.

PRAYER

Wherefore, premises considered, Amici Curiae prays that this Court find Section 46.02(a-1)(2)(C) unconstitutional under the plain meaning of its language and affirm the Court of Appeals's decision acquitting Appellant. *See* TEX. R. APP. P. 78.1(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was served on all counsel of record through electronic service on the same date as the original was electronically filed with the Clerk of this Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Texas Rule of Appellate Procedure 9.4(i)(2)(B). The brief, excluding those portions detailed in Rule 9.4(i) of the Texas Rules of Appellate Procedure, is 7,165 words long. I have relied upon the word court function of Microsoft Word, which is the computer program used to prepare this document, in making this representation. This document was prepared using M. Butterick's Typography for Lawyers font pack, which includes the sans serif font Concourse in 14-point for section headings, 12-point for headers and footers and the serif font Equity Text in 14-point for the body.

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